**PUBLIC PROSECUTOR**

**v.**

**ABD. AZIZ ANUAR & ANOR.**

HIGH COURT MALAYA, PULAU PINANG
WAN ADNAN J
[CRIMINAL TRIAL NO. 19/83]
12 MAY 1988

***CRIMINAL PROCEDURE:*** *Trafficking in a controlled drug - Exhibit not in its original state - Fabrication of evidence - Serious break in the chain of evidence as to the exhibits - Whether failure to call witness fatal to the prosecution case.*

The two accused were charged jointly with three others at large for trafficking in 2872 grammes of cannabis which was an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the said Act. The police acting on information received went to a house at Jalan Thean Teik, Penang. Upon reaching the house, five youths were seen squatting in a circle at the back of the house. When apprehended, they took to their heels and the police gave chase whereupon the two accused were arrested. The police recovered 3 bags containing dried leaves, cut yellow papers and bundles of cannabis. These bags were tendered as evidence set put as Exhs. P3, P4 and P6. Before the trial, Exh. P4 had allegedly been eaten by rats during storage in the Contingent Police Headquarters Exhibit Store. As a result its remnant had to be placed into another plastic bag and exhibit as P5.

At the outset of the prosecution case, the defence Counsel urged upon the Court to regard P5 as something resulting from fabrication of evidence. The Court resolved the issue by holding that a prosecution case does not fail merely because the exhibit which is the subject of the offence has ceased to be in the original state and condition at the time when it is tendered in Court if there is reasonable and acceptable explanation as to how the change had taken place. The Court accepted the explanation by the prosecution witness and together with other evidence found that the prosecution had made out a *prima facie* case against both the accused.

At the trial, both accused chose to give evidence on oath. They denied they were at the back of the house when it was raided. The defence Counsel called DW7 who had a stall in front of the house to support the accused's evidence. DW7 gave evidence to the effect that she did not see both the accused squatting in a circle rolling ganja at the back of the house. Further DW8 and DW9, a reporter and a photographer respectively were also called to enable the defence Counsel to put up the defence that there was a serious break in the chain of evidence as to the exhibits and that the prosecution's failure to call a witness, namely, Corporal Abdul Rahim mentioned in DW8's report as a member of the raiding party was fatal to the prosecution case.

**Held:**

**[1]** When the exhibits were photographed by DW9, the exhibits never left the custody of the police and the police gave evidence as to his presence at the time when the photographs were taken and the proof is the photograph themselves. Therefore, there was no break in the chain of evidence as to the exhibits.

**[2]** The decision whether to call or not to call a witness including a witness from whom statement has been taken is always the right of the prosecution. Failure to call is fatal only when it gives rise to a serious gap in the prosecution case. In this case, it is not part of the

prosecution case that Corporal Abdul Rahman was a member of the raiding party and in fact it was determined that the corporal was not a member of the party. There was no gap in the prosecution case.

**[3]** Both accused had attempted to escape before they were arrested by 2 police officers who had later testified that they never lost sight of the accused during the chase. The Court could not accept the evidence of DW7 on the basis that her stall was in front of the house and she could not have seen what was happening at the back of the house. Therefore, both accused's evidence of the police was in direct contradiction to the evidence of the Police. Nevertheless, the Court accepted the prosecution's evidence. Accordingly, the defence had not on the balance of probability cast any doubt either as to the truth of the prosecution case or as to the guilt of the accused persons.

*[Both accused convicted and sentenced to life imprisonment.]*

**Cases referred to:**
*Haw Tua Tau v. Public Prosecutor [1981] CLJ (Rep) 11*
*Subramaniam v. Public Prosecutor [1956] 22 MLJ 220*
*Abdullah Zawawi v. PP [1985] CLJ (Rep) 19*

**Legislation referred to:**
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a), 39B(2)

*For the prosecution - Josephine Sivaretnam, DPP*
*For the 1st accused - Rajasingam; M/s. Rajasingam & Co.*
*For the 2nd accused - Harpal Singh; M/s. Harpal Singh & Co.*

**JUDGMENT**

**Wan Adnan J:**

The charge against the two accused persons was as follows:

> That you jointly with three others at large, on 11 April 1983 at about 4.15 p.m. at the rear area of premises No. 186-C Jalan Thean Teik, in the District of Georgetown in the State of Pulau Pinang, did on your own behalf, traffick in dangerous drugs to wit cannabis weighing 2872 grammes and you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act.

The case for the prosecution was that on 11 April 1983 at about 4.10 p.m. acting upon information received a police party led by PC Anan (PW1) went to Jalan Thean Teik, Penang. The other members of the party were:

1. PC Hamidin - PW5
2. PC Zailan
3. PC Razali - PW2
4. PC Muniandy
5. PC Ronnie - PW3

On arriving they divided themselves into two groups. The first group consisted of PW1, PW3 and PC Zailan. The second group consisted of PW5, PW2, and PC Muniandy. The first group went to the right side of the house No. 186C while the second group went to the left side of the house. Five youths were wrapping dried leaves which were suspected to be

cannabis. PW1 shouted "Police - don't run away". The youths took to their heels. They were chased. Accused No. 1 was arrested by PW3 while accused No. 2 was arrested by PW2. The other three managed to escape.

At the place where the youths were seen squatting in a circle the following were recovered:

1. A sack half-filled with dried leaves - P3.
2. A black bag containing cut yellow papers - P6.
3. A green bag containing two bundles of cannabis in rolls - one consisting of thirty (30) rolls and the other fifty (50) rolls - P4.

PW5 also found scattered on the ground at that place cannabis and cut yellow papers similar to the ones found in the black bag P6. He collected them and put the scattered cannabis in the sack P3 and the cut yellow papers in the black bag P6. All the items were taken possession by PW5.

On 13 April 1983 ASP Yeap Hooi Pin (PW8) packed P3, sealed and marked it "A". He also packed the 80 rolls found in the green bag, P4, marked it "B". He forwarded both packets to the chemist, Tan Chen Yean (PW6). PW6 testified that the plant material found in P3 and in the rolls were cannabis. She repacked the packets "A" and "B", sealed with the seal of the Department of Chemistry and returned the same to PW8 on 25 April 1983. Before she repacked packet "B" she rolled back the plant material into rolls with the same papers. PW8 then stored these two packets together with the other exhibits in the Contingent Police Headquarters Exhibit Store.

The packet marked "B" when tendered as an exhibit in Court was not in its original state. It was tendered as P5 - a plastic bag containing cannabis - PW8 gave the explanation. He said that on 11 April 1988 (the day this trial began) he sent someone to collect the exhibits from the store. He was later informed that the exhibit (packet "B") had apparently been eaten by rats. He then went to the Exhibit Store and saw the corporal in charge. He testified

> I went to the place where this particular exhibit had been stored. I found a heap of ganja left. I collected them and put them in a plastic bag as in ID5, (P5). This was found next to P3, P4 and ID6 (P6). The exhibits were stored in serial numbers. There was no other exhibit in the store in reference to the serial number of the exhibit I stored earlier. Therefore it is my conclusion that ID5 (P5) was part of the packet "B" which I received back from the chemistry department.

Later under cross-examination and at the suggestion of the learned Counsel he said "I cannot be 100% sure that P5 is the remnant of the packet "B" which I stored earlier."

At the close of the prosecution case I had to consider whether there was some evidence (not inherently incredible) which would establish each essential element of the alleged offence. (*Haw Tua Tau v. Public Prosecutor* [1981] CLJ (Rep) 11).

The learned Counsel for accused No. 1 had urged upon me to regard P5 as something resulting from fabrication of evidence. He further submitted that if P5 was rejected then the case for the prosecution failed.

I cannot find any evidence to show or even to suggest that there had been fabrication of evidence. One must expect to derive some advantage from any act of fabrication. In this case what was the advantage that the prosecution expected to get? There was no advantage. In fact it was to its disadvantage. I accepted the evidence of PW8 as reasonable explanation as to how packet "B" had come to be in its present state as in P5. Although PW8 had

stated that he could not be 100% sure the circumstances pointed to the irresistible inference that P5 was the remnant of the packet "B". A prosecution case does not fail merely because the exhibit which is the subject of the offence has ceased to be in the original state and condition at the time when it is tendered in Court if there is a reasonable and acceptable explanation as to how the change had taken place.

I was satisfied that there was evidence that both accused persons had custody of P3 and P4 so as to give rise to the presumption under s. 37(d). The presumption under s. 37(da) also arose since the weight of the cannabis found was more than 200 grammes, I therefore found that the prosecution had made out a *prima facie* case against both the accused persons and I called them to enter into their defence.

Accused No. 1 elected to give evidence on oath. He said that on the day in question sometime after 3 p.m. he went to a shop to buy soap and cigarettes. After that he went to sit on a bench at the place behind house No. 186C. There were many people there including some of his friends. His friends were patching leather to their trousers. Then he saw his friends running away. He did not run but continued to sit on the bench. Later the police asked for his identity card and handcuffed him. He denied having anything to do with the cannabis found there. He denied he was squatting with the others rolling the cannabis.

Accused No. 2 said on oath that on the day in question at about 3.20 p.m. he accompanied his father to a bus stop. On the way back he wanted to go to a shop. He followed a short cut through the kampung. He stopped at a place behind house No. 186C. There were many people there - fourteen or fifteen in number. He met a Chinese boy there. He was drunk. After a scuffle with the boy, he left the place and went to the shop. About five minutes later when he was in front of the shop he was arrested. He denied he was one of the five youths squatting and rolling cannabis. He also denied having anything to do with the cannabis.

Rodiah bt. Ahmad (DW7) gave evidence for the defence. She said that she had a stall in front of house No. 186C. On 11 April 1983 at about 4 p.m. she was at the stall selling mee. She said she did not see accused No. 1 and accused No. 2 squatting in a circle rolling ganja at the back of the house. When pressed during cross examination she agreed that from the stall she could not see anything at the back of the house. During re-examination however she said she could see the back of the house because she moved from the front to the back of the house and vice versa. Joseph Chin (DW8) a reporter with the Star newspaper, said that on 11 April 1983 after receiving an anonymous call he went to Kg. Baru Police Station. He went with a photographer Seow Heng Sin (DW9). He made a report which was published in the Star on 12 April 1983. The report was tendered and admitted as D17. DW9 tendered photographs which were admitted as D16A-E.

I admitted the newspaper report (D17) not as evidence to establish the truth of the contents of the report but merely as evidence that the report was made and published (*Subramaniam v. Public Prosecutor* [1956] 22 MLJ 220.

Based on the evidence of DW8 and DW9 the defence Counsel at the close of the defence case submitted that:

(a) There was a serious break in the chain of evidence as to the exhibits;

(b) The prosecution should have called as witness Corporal Abdul Rahim, the police officer mentioned in D17. Failure to call was fatal to the prosecution case.

It was submitted that when the exhibits were photographed by DW9, the exhibits had been taken out from the custody of PW1. I found that the exhibits never left the custody of PW1 when they were photographed by DW9. PW1 had stated in evidence that the exhibits were in his custody until he handed them to Inspector Ahmad at 11.20 p.m. that day. PW1 was present at the time when the photographs were taken. The proof is the photographs themselves. There was therefore no break in the chain of evidence as to the exhibits.

The Exh. D17 (the newspaper report) had mentioned that the police party was led by Corporal Abdul Rahim. I like to mention here that when the contents of D17 was first brought to the notice of the Court by the learned defence Counsel the learned DPP was requested to make the said Corporal Abdul Rahim available. I was later informed that the said corporal and the Kg. Baru Police Station station diary were made available to the defence.

The decision whether to call or not a witness including a witness from whom a statement has been taken is always the right of the prosecution. Failure to call is fatal only when it gives rise to a serious gap in the prosecution case (*Abdullah Zawawi v. PP* [1985] CLJ (Rep) 19. In this case it is not part of the prosecution case that Corporal Abdul Rahim was a member of the raiding party. PW8 had stated that he had made enquiries after he came to know of D17 and determined that the corporal was not a member of the party. There was no gap in the prosecution case.

It is fundamental that it is not for the defence to prove anything and that all that is required of it is to tender an explanation that is reasonable and probable and which casts a doubt either as to the truth of the prosecution case or as to the guilt of the accused.

Accused No. 1 was arrested by PW3. PW3 said in evidence

> I saw a group of men in a circle, I saw them rolling something ... I had targeted one man. He ran and I chased him ... He was facing me. I could see him clearly from where I was. He was rolling leaves ... I chased him all the way and never lost sight of him ... He is the first accused.

Accused No. 2 was arrested by PW2. PW2 said in evidence

> One of the Malay men got up. He was squatting at the left side of the group circle ... The man looked to the back and he ran away ... I followed him ... I never lost sight of him while chasing him. I gave chase and managed to catch him ... He fell down and I caught him.

Accused No. 2 was also known to PW5. PW5 saw him in the group.

What were recovered at the place where the five men were squatting were consistent with the evidence that the men were rolling cannabis. There were scattered cannabis and cut yellow papers on the ground.

I could not accept the evidence of DW7. Her stall was in front of the house and she could not have seen what was happening at the back of the house. Her stall was busy that afternoon.

The two accused persons in their evidence denied having anything to do with the cannabis. Their evidence was in direct contradiction to the evidence of the police constables of the raiding party. I found that the police witnesses were truthful witnesses and I accepted their evidence.

After carefully considering the whole of the defence case, I found that the accused persons' stories could not be considered to be reasonably true or consistent with their innocence. The defence had not on the balance of probability cast any doubt either as to the truth of the prosecution case or as to the guilt of the accused persons.

I therefore found both the accused persons guilty as charged and I convicted them.

I sentenced both accused persons to life imprisonment and ordered that each be whipped with six strokes.

In passing the sentence I took into consideration the following factors:

1. The mental health of accused No. 1 DW3 gave evidence of his mental health. He had been admitted into the Psychiatric Unit of the General Hospital and had received treatment.

2. The age of accused No. 2. He was only 20 years old at the time of the commission of the offence.

3. The drugs being cannabis were less deleterious.

Also found at [1989] 1 CLJ 1117